No. [redacted] 196

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~1054~~

MELVIN MORRIS, AARON COLEMAN, HYAM G. YAMINS, and HAROLD DUCORE, *Petitioners*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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MELVIN MORRIS, AARON COLEMAN, HYAM G. YAMINS, and HAROLD DUCORE, *Petitioners,*

v.

UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the final orders of the United States Court of Claims dismissing on defendant's motion the petition in each of the four cases below.

CITATION TO OPINION BELOW

The Court of Claims did not render any opinion in the present cases. The final decision below consists of an order, entered by the lower court in each of the four cases, dismissing on defendant's motion each petition. The order in each case recites that it is entered on the basis of the opinion by the Court of Claims

in *Zeiger* v. *United States*, 295 F. 2d 915 (C. Cls. 1961), which was decided while the present cases were pending in the Court below. The final order entered in each case below and the opinion of the Court of Claims in *Zeiger*, together with the dissenting opinion in that case of Retired Justice Stanley Reed, sitting by designation, are reprinted in the Appendix hereto.

JURISDICTION

The orders by the Court of Claims were entered on March 23, 1962. The Court of Claims had jurisdiction under 28 U.S.C. § 1491. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1255.

STATUTE INVOLVED

The present case involves the Act of August 26, 1950, as amended, 64 Stat. 476, 5 U.S.C. § 22-1, and more particularly that portion of the statute italicized below:

> "Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Administrator of the National Aeronautics and Space Administration, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy,

Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Aeronautics and Space Administration, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty: The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a

decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further, That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government."

QUESTION PRESENTED

Whether an employee of the federal government, found by the Court of Appeals to have been illegally discharged as an alleged "security risk," is entitled under 5 U.S.C. § 22-1, following reinstatement, to restitution for the annual leave which would have accrued to such employee during the period of his invalid discharge?

STATEMENT

1. In the fall of 1953, a subcommittee of the Senate Internal Security Committee, headed by the late Senator Joseph McCarthy, conducted widely publicized "executive hearings" with respect to alleged subversive activities at the Signal Corps Research installation at Fort Monmouth, New Jersey. Following these "hearings," some twenty-five civilian employees at Fort Monmouth, including the four petitioners (Plaintiffs below), were discharged from government service as "security risks."[1] Petitioners are physicists and engineers who were civilian employees of the Department of the Army at Fort Monmouth. Each Petitioner was a permanent Civil Service employee. Each had a long record of employment with the federal government. Each had a high ranking Civil Service status.[2] And each had received citations and commendations for his work.

Petitioners brought suit in the District Court for the District of Columbia challenging the legality of their discharge and seeking reinstatement. The complaints were dismissed by the District Court (*Coleman et al. v. Brucker*, 156 F. Supp. 126 (D.D.C. 1957)

[1] All of the discharged employees were subsequently reinstated as a result of administrative or judicial action.

[2] Petitioner Melvin Morris is a physicist, who was employed by the government from 1942 until his suspension in 1953, and who at the time of his suspension had a Civil Service Classification of GS-13. Petitioner Harold Ducore, an electrical engineer, was employed from 1941 to 1953, and had a GS-14 classification. Petitioner Hyam G. Yamins, a physicist, was employed from 1940 to 1953, and had a GS-14 classification. Petitioner Aaron Coleman, an electrical engineer, was employed from 1939 to 1953 (except for the period 1944-1946 when he served as a marine radar officer), and had a GS-14 Civil Service rating. (Joint Appendix, *Coleman v. Brucker*, 257 F. 2d 661 (D.C. Cir. 1958), pp. 4, 58, 190, 235.)

(Holtzoff, J.)). On appeal, however, the judgment was reversed by the Court of Appeals for the District of Columbia which held that Petitioners had been illegally discharged for the reason that the Department of the Army had failed to furnish Petitioners with findings as required by the applicable regulations (*Coleman et al.* v. *Brucker*, 257 F. 2d 661 (D.C. Cir. 1958)). Consistently with the opinion of the Court of Appeals, the District Court subsequently entered a judgment with respect to each petitioner which recited, *inter alia*, that

> "the action of the Department of the Army and its officials purporting to terminate Plaintiff's employment with the Department of the Army . . . was invalid . . ." (*Coleman, et al.* v. *Brucker*, Order dated October 17, 1958, Civil Action No. 3822-56 *et seq.*, D.D.C.).

The judgment further directed that each Petitioner should be reinstated or restored

> "to his former position if it is available, or to a position of like grade, seniority, status and pay, with the benefit of all rights, emoluments, and privileges flowing from a continuity of service from the date of the suspension to the date of [judgment] . . ., the period of Plaintiff's suspension and removal to be considered as service for all purposes." (*Ibid.*)[3]

2. Each Petitioner was thereafter reinstated. Each Petitioner duly filed a claim with the Department of the Army for the "back pay" due him under 5 U.S.C. § 22-P for the period of his illegal discharge. The

[3] An identical judgment was entered by the District Court with respect to each Petitioner.

Army paid each Petitioner a sum, allegedly representing the salary which such employee would have received from the government during the period of his discharge less the total amount received by such employee from private employers during the relevant period.[4]

The Army, however, rejected each Petitioner's claim that payment to him should include the monetary equivalent of the annual leave which would have accrued to each employee during the period of his wrongful discharge, had he not been illegally separated. Under 5 U.S.C. § 2062(a), each Petitioner, as a federal government employee, would have been entitled to accrue and use annual leave with pay at a rate of about 20-25 days per year during this period.[5] The Department of the Army declined to credit each Petitioner for this accrued leave upon his reinstatement, and accordingly this emolument of government service was entirely lost to petitioners. While the monetary value of this lost accrued leave was not determined in

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[4] In each case, the Department computed the salary which the employee would have received on the basis of the rate which the employee was receiving from the government on the date of his suspension or termination. No allowance was made for in-grade increases which such employee would have received during the period of his discharge, nor was any recognition given to legislative increases in the rate of pay which were enacted during the discharge period.

[5] The government submitted figures to the Court below which showed that each Petitioner would have accrued leave in the following amount:

Ducore—944 hours
Yamins—994 hours
Morris—880 hours
Coleman—no amount specified

the Court below, it is estimated that it amounts to between $3,000-$4,000 for each Petitioner.

3. Following the Army's rejection of this portion of their claims, Petitioners brought suit in the Court of Claims, asking for the monetary value of the leave which would have accrued. At the time their petitions were filed, the Court of Claims had held, on at least five separate occasions, that illegally separated employees were entitled to reimbursement under 5 U.S.C. § 22-1 for accrued annual leave. *Hynning* v. *United States*, 141 C. Cls. 486, 493-494 (1958); *Prosterman* v. *United States*, 144 C. Cls. 692, 696 (1959); *McGuire* v. *United States*, 145 C. Cls. 17, 22 (1959); *Vitarelli* v. *United States*, 279 F. 2d 878 (C. Cls. 1960); *Habicht* v. *United States*, 290 F. 2d 832, 835-836 (C. Cls. 1961).

While Petitioners' cases were pending, the Court of Claims, in *Zeiger* v. *United States*, 295 F. 2d 915 (C. Cls. 1961) (reprinted in the Appendix), overruled its five prior decisions and held that illegally discharged employees were not entitled under 5 U.S.C. § 22-1 to the monetary equivalent of the annual leave which would have accrued during the period of unlawful discharge. Retired Justice Reed, sitting by designation, dissented (*Id.* at 917).

Thereafter, on motion of the defendant, the Court of Claims, relying upon *Zeiger*, dismissed each of the four petitions.

REASONS FOR GRANTING THE WRIT

This case raises an important question with respect to interpretation of legislation enacted to provide restitution to unjustly discharged federal government employees. The Court of Claims has construed the applicable statute (5 U.S.C. § 22-1)—a "statute of

atonement" in Justice Reed's phrase—so as to deny an employee, illegally discharged as a "security risk," any compensation for the annual leave which would have accrued during the period of the employee's wrongful discharge and which the employee was prevented from enjoying by reason of his invalid separation. This narrow, miserly construction of a remedial statute frustrates the Congressional intent to "make the vindicated civil servant whole" (295 F. 2d at 919). It is based upon the unrealistic premise that an employee who is fired as a "security risk" occupies a status comparable to that of an employee on leave who is enjoying a vacation. The decision below ignores the legislative history of the controlling statute. It cannot be squared with related legislation which recognizes that accrued annual leave has a liquidated value.

In reaching the decision below, the Court of Claims overruled at least five of its prior decisions. This case thus presents an appropriate opportunity to correct a misinterpretation of an important remedial statute and to insure that restitution is made to government employees unjustly discharged as a "security risk." The erroneous nature of the lower court's ruling and the reasons for granting this writ, which we discuss below, are clearly delineated in the dissenting opinion by Retired Justice Reed in *Zeiger* v. *United States*, 295 F. 2d 915, 917 (C. Cls. 1961), pp. 6a-10a, *infra*.

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(1) The applicable statute (5 U.S.C. § 22-1) is designed to provide full monetary restitution to an employee who has been wrongfully discharged on security grounds and who is subsequently reinstated. The act provides, in material part, that a reinstated employee shall be compensated "in an amount not to exceed the

difference between *the amount such person would normally have earned* during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person . . ." (emphasis supplied). It is clear, as Justice Reed pointed out in his dissenting opinion in *Zeiger*, that "'the amount such person would have normally earned during the period of suspension or termination' is *his salary plus the value of his annual leave.*" (295 F. 2d at 918) (emphasis supplied). Indeed, the Court of Claims itself so recognized in an earlier decision, *Hynning* v. *United States*, 141 C. Cls. 483 (1958), which the lower court overruled in its opinion in *Zeiger* v. *United States, supra*. As the Court of Claims pointed out in *Hynning* (*Id.* at 493), an employee who was not discharged "would have had both the pay which he has now received as 'back pay' and the benefit of the leave. Had the plaintiff remained on duty, he would have had to take his leave or forfeit it, but we should assume that he would have taken it. We cannot give the plaintiff the leave but we can give him the money equivalent of it."

There is, of course, no doubt that accrued annual leave has a liquidated value. Thus, the statute governing the amount of "unpaid compensation" to be paid the representatives of a deceased governmental employee provides for "payment for all accumulated and current accrued annual or vacation leave equal to the compensation the employee would have received had he lived . . ." (5 U.S.C. § 61g(6)). Moreover, an employee who is separated is entitled to "compensation in a lump sum for all accumulated and current accrued annual or vacation leave." (5 U.S.C. § 61b). Similarly,

5 U.S.C. § 2061a provides for liquidation of accrued annual leave by a "lump sum payment" to certain exempt officers. If the ruling of the Court of Claims is permitted to stand, employees discharged on security grounds who are subsequently cleared and restored to employment will not be made whole; instead they will have received only partial restitution.

(2) The ruling by the Court of Claims disregards the legislative history of the statute involved in this case. A comparison of 5 U.S.C. § 22-1 with the statute it superseded (Public Law 623, 62 Stat. 354) indicates that Congress intended that compensation for accrued leave should be made to an employee erroneously discharged on security grounds. Section 6(b)(1) of the superseded statute (62 Stat. 355)—a 1948 amendment to the Lloyd-LaFollette Act—provided for compensation to an improperly discharged employee "at the rate received on the date of such removal or suspension . . . and [the employee] shall for all purposes *except the accumulation of leave* be deemed to have rendered service during such period." This statute was specifically called to the attention of the Congressional Committees which recommended enactment of 5 U.S.C. § 22-1. (See S. Rep. No. 2158, 81st Cong. 2d Sess. (1950), quoted at 2 U.S. Code Cong. Serv. 3282-83 (1950).) But the italicized language was omitted from 5 U.S.C. § 22-1. Thus, the statutes, when read in *pari materia*, indicate that Congress intended that an employee reinstated after an erroneous discharge on security grounds should be credited for leave which would have accumulated during the discharge period. That is to say, the wronged employee is to be treated as if he never had been removed. He is entitled, in the words of the District Court judgment directing the

reinstatement of Petitioners, to "the benefit of all rights, emoluments, and privileges flowing from a continuity of service" p. 6, *supra*.

(3) The Court of Claims reasoned that the employee should be denied compensation for accrued leave because during the period of discharge he "was admittedly not working for the Government. He did not earn the additional leave . . ." (295 F. 2d at 917). The short answer is that Petitioners were prevented by the Army's illegal conduct from working for the government so as to "earn" their leave. The Court below also felt that the claim should be denied because "the plaintiff has been paid every penny that he would have earned had he remained on the payroll . . . . and taken his leave each year" (295 F. 2d at 916). This argument is inaccurate[6] and beside the point. The fact is that Petitioners were unable to take their leave, and they were thereby deprived of a valuable right. Finally, the government argued below that "So far as the Government is concerned, plaintiff was in a status akin to a leave status throughout the period of his suspension." According to the government, Petitioners, discharged as "security risks," were in the same status as if they had taken "leave for two hours to play golf." *(Defendant's Answer to Plaintiff's Motion for Judgment on the Pleadings, and Defendant's Cross-Motion for Judgment on the Pleadings, Morris* v. *U. S.*, p. 6). The response to this extraordinary view was articulated by Justice Reed who pointedly stated: "I hardly think

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[6] Petitioners would have received more if they had not been illegally discharged; they would have received legislative pay increases and in-grade increases, items which the Court of Claims has permitted to be excluded in computing back pay. See p. 13, *infra*.

Mr. Zeiger can be said to have been on 'vacation' during the period between discharge [as a security risk] and reinstatement." (295 F. 2d at 919).

(4) Enactment of 5 U.S.C. § 22-1 was animated by the impulse to do justice to wrongfully discharged employees who suffered the terrible stigma and the incalculable emotional and economic hardship stemming from removal on security grounds. See Brown, *Loyalty and Security* 185-86 (1958). The statute, however, has been interpreted and administered in a niggardly, restrictive way. The Court of Claims has held that a reinstated employee is not entitled to receive the benefit of in-grade increases or legislative increases which occurred during the period of his suspension or termination. *Hyaning* v. *United States*, 141 C. Cls. 486, 492 (1958). The decision below, denying recognition for accrued annual leave which was lost without the employee's fault, is palpably inconsistent with the spirit of the statute. As Justice Reed pointed out in concluding his dissent in *Zeiger* (295 F. 2d at 919):

> "Dollars will not salve the wounds of this victim of administrative error, but the Government's statute of atonement should not be narrowly construed to restrict his indemnification to the lowest reasonable dollar figure. Evidently from the language of the authorization for payment, the purpose was to make the vindicated civil servant whole. This requires, payment, in my judgment, for the loss of leave . . ."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 19, 1962

APPENDIX

A. Orders Entered Below

IN THE UNITED STATES COURT OF CLAIMS

155-61 HAROLD DUCORE (1)
HYAM GERBER YAMINS (2)
387-61 AARON COLEMAN

v.

THE UNITED STATES

Order

These cases come before the court on defendant's motion to dismiss plaintiffs' petitions. Upon consideration thereof, together with the briefs of counsel and on the basis of the decision by this court in *Zeiger* v. *United States*, No. 389-60, decided November 1, 1961,

IT IS ORDERED that the defendant's motion to dismiss plaintiffs' petitions be and the same is granted and the plaintiffs' petitions are dismissed.

BY THE COURT

Mar 23, 1962

MARVIN JONES
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 419-60.

MELVIN MORRIS

v.

THE UNITED STATES

Order

This case comes before the court on plaintiff's and defendant's motions for judgment on the pleadings. Upon consideration thereof, together with the briefs of counsel and on the basis of the decision by this court in *Zeiger* v. *United States*, No. 389-60, decided November 1, 1961,

IT IS ORDERED that the defendant's motion for judgment on the pleadings be and the same is granted, plaintiff's like motion is denied and plaintiff's petition is dismissed.

BY THE COURT

Mar 23, 1962

MARVIN JONES
Chief Judge

B. Opinion Below in Zeiger v. United States

IN THE UNITED STATES COURT OF CLAIMS

No. 389-60

(Decided November 1, 1961)

ISIDORE ZEIGER

v.

THE UNITED STATES

Clifford J. Hynning for the plaintiff.
Kendall M. Barnes, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for the defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

JONES, *Chief Judge*, delivered the opinion of the court:

The issue is how much leave plaintiff is entitled to be compensated for upon his reinstatement after wrongful discharge. The case is before us on plaintiff's and defendant's motions for summary judgment and the facts are undisputed.

Plaintiff, an Army Signal Supply Agency employee, was suspended August 19, 1953, and removed as a "security risk" on August 5, 1954. On May 12, 1958, plaintiff, following appeal, was reinstated.

Plaintiff has received pay for the period of his suspension and removal. At that time he had 82 hours of annual

leave to his credit. At the time of his restoration he was credited with 240 hours of annual leave, which was the total amount of unused annual leave which could be accumulated at the end of any year had he remained in the service.

It is stipulated, however, that had plaintiff not been suspended an additional 606 hours would have accrued at the annual rate of 160 hours per year during the 4 years 9½ months of his suspension, and that plaintiff might have used this leave currently had he not been removed.

Plaintiff sues for the monetary value of 606 hours of annual leave. This is the primary issue to be decided.[1] Otherwise the plaintiff has been fully compensated for the period of suspension.

The plaintiff asserts that he is entitled to compensation for annual leave which would have accrued during the period of his unlawful suspension and removal and which plaintiff was prevented from using currently by the unlawful acts of defendant, and that in these circumstances the plaintiff is not required to forfeit such accrued leave. It is the contention of plaintiff that the acts of sundry officials of the Department of the Army in suspending and removing plaintiff and refusing to reinstate or restore him prior to May 12, 1958, prevented him from serving during the period of suspension and further prevented him from using the annual leave that otherwise would have accrued to him during such period.

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[1] There is an incidental issue as to the amount constituting the money equivalent of 606 hours of leave. When plaintiff's services were terminated in May 1960, the value would vary depending on whether the value should be based on the amount plaintiff was (1) earning at the date of his separation, or (2) the rate applicable to the same job, at the time of reinstatement, or (3) the rate of plaintiff's compensation at the time of his separation by reduction in force in May 1960. In view of our disposition of the case it is not necessary to reach this issue.

The defendant contends that plaintiff has been fully compensated for the period of his suspension; that while he could have taken the full 160 hours of leave during each year, his actual pay would have remained the same; that if he had taken no leave during the period, his pay would have been identical to that which it would have been had he taken the leave; that he could have accumulated leave up to 240 hours and any accumulation above that amount would have been forfeited at the end of the year; that plaintiff has received full payment for each year of suspension in the exact amount that would have been paid him had he continued working, whether or not he took his annual leave; and that if plaintiff were paid for the additional 606 hours of leave he would receive more money than he would have received had he remained on the payroll during the entire period.

Both parties cite and discuss the cases of *Hynning* v. *United States*, 141 Ct. Cl. 486 (1958), *Prosterman* v. *United States*, 144 Ct. Cl. 692 (1959), *McGuire* v. *United States*, No. 383-54, decided February 11, 1959, and *Vitarelli* v. *United States*, 279 F. 2d 878 (1960). The court was divided in the *McGuire* and *Vitarelli* cases which involved somewhat similar issues to those in the instant case. In the *Hynning* case the court was presented with the same issue that is involved here.

Upon further consideration of the issue involved, we have reached the conclusion that the plaintiff is not entitled to recover in the instant case. A special proviso of the Act of August 26, 1960 (5 U.S.C. § 22-1), is as follows:

> * * * any person whose employment is so suspended or terminated * * * may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for *all or any part of the period* of such suspension or termination in an amount *not to exceed* the difference between the amount such person would normally have earned during the period of such sus-

pension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: * * *. [Emphasis supplied.]

It will be noted that the provision for pay after reinstatement is in the discretion of the agency and the quoted provision cites the top limit on the amount which may be paid in the event of restoration.

Plaintiff has been paid every penny that he would have earned had he remained on the payroll and had taken his leave each year. At the time of his removal he had 82 hours of accumulated leave. At the time of his restoration he was given credit for the 82 hours plus enough of the leave which he would have earned in one year had he remained in the service to amount to 240 hours. This is the total amount that he could have carried over at the end of any year had he not been removed and had continued in the service. We think this meets the requirement of the statute.

Of course, had plaintiff remained in the service during the period of his suspension he could have taken 4 weeks of leave each year without any diminution in his annual pay. It is reasonable to assume that the annual leave is the period allotted for vacation and rest and relief from the labors of the other 48 weeks during which he is continually at work for 40 hours per week.

During this period of nearly 5 years' suspension plaintiff was admittedly not working for the Government. He did not earn the additional leave and certainly he was not required to work for the Government during the 4 weeks' annual rest or vacation period which he might have taken in the way of rest from his labors. In fact, during that period he was not required to do any work for the Government.

In the *Hunning* case, *supra*, we permitted the plaintiff to recover the value of leave in excess of the "ceiling" placed

by the Congress on the amount of leave that might be accumulated, thus allowing greater pay than he would have received had he not been suspended.

Leave is a permissive thing, governed by statute and regulations. Subdivision (c), § 2062, Title 5 of the United States Code (1958 ed.)[2] places a maximum limit of leave that may be accumulated and states that it shall not exceed that amount. The notice of reinstatement says that the action taken is subject "to all applicable laws, rules, and regulations", and that annual leave "is authorized, subject to applicable rules and regulations concerning accumulation, use and forfeiture." [See stipulation.]

The Department denied the excess above the accumulated ceiling. The Comptroller General has also denied payment, pending further argument of the legal issues involved.

If plaintiff were paid for the 606 hours involved here, he would receive some $300 per year more than he would have received had he remained on the payroll, regardless of whether he used his current annual leave.

In so far as this conclusion is in conflict with the *Hynning, Prosterman, McGuire* and *Vitarelli* cases, *supra*, they are overruled. Defendant's motion for summary judgment is granted, and plaintiff's like motion is denied. Plaintiff's petition will be dismissed.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*, and WHITAKER, *Judge*, concur.

REED, *Justice* (*Ret.*), sitting by designation, dissenting:

My view of the effect on this litigation of that portion of the national security legislation that provides for the allowance of compensation for wrongful discharge to any em-

[2] See also § 2066(a).

ployee restored to duty after dismissal for security reasons[3] is contrary to that of the court.

That provision differs markedly from one that it supersedes in that the older statute specifically provides for compensation on reinstatement to the one discharged "at the rate received on the date of such removal or suspension . . . and shall for all purposes *except the accumulation of leave* be deemed to have rendered service during such period." [Emphasis supplied.] Such a change, particularly after

[3] The act provides in pertinent part: "*Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: . . ." 64 Stat. 477.

[4] 62 Stat. 355. The whole of the relevant section, § 6(h)(1), reads:

"Any person removed or suspended without pay under subsection (a) who, after filing a written answer to the charges as provided under such subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date."

the earlier statute was specifically called to the attention of the committees in charge of the bill, is significant.[5]

Not only is the change significant, but the language of the presently applicable payment proviso of the act seems to me to require adjustment for accumulated leave. The reinstated employee, wrongfully deprived of his place, is to be made whole by payment of the difference between what he would have normally "earned [in Government] during the period of such suspension or termination, at the rate he was receiving . . . and the interim net earnings of such person." 64 Stat. 477.

His normal government earnings were his annual salary plus his four weeks leave calculated at the same rate daily, weekly, monthly or annually as the basic pay. The court opinion, of course, concedes that plaintiff "could have taken four weeks of leave each year without any diminution in his annual pay." From this it seems to me to follow that the "amount such person would normally have earned during the period of suspension or termination" is his salary plus the value of his annual leave. The United States has recognized by its legislation that the privilege of leave has a defi-

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[5] The Chairman of the Civil Service Commission said: "Since Congress, in enacting Public Law 623, approved June 24, 1948 (62 Stat. 354), recognized the need to compensate employees who are restored to duty after a period of unjustified removal or suspension from duty without pay for the whole of the period of such separation, it is the opinion of the Commission that the same mandatory provisions for back pay should be extended to employees who are cleared of charges of conduct considered to be detrimental to the interests and security of the United States and who are restored to employment as a result of such clearance."

This letter was set forth in both the House and Senate reports. S. Rep. No. 2158, 81st Cong., 2d Sess. 6; H.R. Rep. No. 2330, 81st Cong., 2d Sess. 7.

nite value. Title 5, sec. 61g(6),[6] defining the amounts to be paid the representatives of deceased employees, provides that the term "unpaid compensation" shall include:

> "payment for all accumulated and current accrued annual or vacation leave equal to the compensation the decedent would have received had he lived and remained in the service until the expiration of the period of such annual or vacation leave; . . ."

From the amount which would have been earned in Government is to be deducted his earnings during the period of his governmental suspension or termination, including the value of any leave taken or authorized at his outside employment. In no other way can he be made whole for the admitted though unintentional wrong done him by the Government.

Is not the Government's position inconsistent? It admits on the one hand that plaintiff is entitled to the amount of leave which he could have accumulated had he been employed by the Government during the period of his discharge. On the other hand it argues that he is not entitled to be credited for the value of any leave whatsoever. If plaintiff is entitled to be credited for any leave at all, he should receive the full amount. There is no warrant in the statute now in controversy for limiting the amount by the leave he could have accumulated.

I think that *Hunning* v. *United States*, 141 Ct. Cl. 486, was properly decided and would find for the plaintiff and direct the case be submitted to the Commissioner under

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[6] 72 Stat. 1761.

5 U.S.C. § 61(b) provides in part that: "The lump-sum payment herein authorized [for accumulated leave on separation from Government] shall not be regarded, except for purposes of taxation, as salary or compensation and shall not be subject to retirement deductions." [67 Stat. 138]. It is arguable that this lends support to the court's position; I think that it was not intended to define the amounts to be paid under the statute in controversy.

Rule 38 of the Court of Claims to find for plaintiff on a balance of the accounts.

Dollars will not salve the wounds of this victim of administrative error but the Government's statute of atonement should not be narrowly construed to restrict his indemnification to the lowest reasonable dollar figure. Evidently from the language of the authorization for payment, the purpose was to make the vindicated civil servant whole. This requires payment, in my judgment, for the loss of leave. I hardly think that Mr. Zeiger can be said to have been on "vacation" during the period between discharge and reinstatement.